Domestic Violence and Access to Children

CHAPTER 12

In This Chapter...

12.1 Chapter Overview

MCL 722.25(1) provides that the "best interests" of the child control in proceedings under the Child Custody Act of 1970. In implementing this legislative policy, the Child Custody Act assumes that cooperation between the parties to a child access dispute tends to foster the child's best interests. Thus, one of the "best interest" factors under the Act is a party's "willingness and ability . . . to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent . . . . " MCL 722.23(j). Moreover, the Act encourages cooperation between the parties by requiring courts to implement the parties' agreements unless there is a showing by clear and convincing evidence that an agreement is not in the child's best interests. See MCL 722.26a(2) (agreements for joint custody), and MCL 722.27a(2) (agreements to parenting time terms).

Studies show that cooperation between the parties to child access disputes can reduce the negative impact of divorce on children. In cases involving domestic violence, however, cooperation may not be possible. Indeed, the abused individual's separation from the relationship may intensify the abuse and increase the risk of physical violence as the abusive party seeks to regain lost control. In such cases, efforts to promote cooperation can have dangerous and inequitable effects on both the abused party and the children involved.* As one commentary puts it:

*See Section 1.4(B) on separation violence and Section 1.7 on the effects of violence on children.

> "The abuser's access to the children endangers rather than nourishes them; the imbalance of power between abuser and victim transforms alternative dispute resolution into yet another weapon in the abuser's arsenal; and striving for family preservation confronts the victim with the . . . choice of remaining

in a potentially lethal setting in order to continue living with her children or abandoning them and her home." Dunford-Jackson, et al, *Unified Family Courts: How Will They Serve Victims of Domestic Violence?* 32 Family Law Quarterly 131, 132 (1998).

Id. at 133, and Finn & Colson, *Civil Protection Orders: Legislation, Current Court Practice, & Enforcement,* p 4 (Nat'l Inst of Justice, 1990). See Section 10.6 for concerns about alternative dispute resolution in cases involving domestic violence.

The presence of domestic violence in a custody or parenting time dispute requires a shift in focus to accommodate unique safety and equitable concerns that are not present in other domestic relations actions. For example, the court may find it necessary to separate the parties and shield the abused party rather than to issue orders that promote conciliation and cooperation. Moreover, the court may be compelled to hold the abusive party accountable for compliance with court orders by imposing constraints, sanctions, and restitution. Finally, the criminal nature of domestic violence may make it inappropriate to encourage negotiated settlement of custody or parenting time disputes, particularly where the abused party is not represented by counsel.*

With the foregoing concerns in mind, this chapter and Chapter 13 explore how a court can prevent custody or parenting time arrangements from providing abusers with opportunities for continuing harassment, threats, or violence. The discussion covers both Michigan custody and parenting time proceedings (Chapter 12) and proceedings involving multiple jurisdictions (Chapter 13).

This chapter assumes the reader's basic familiarity with Michigan domestic relations procedures. It will not address third-party custody or visitation issues or child protective proceedings. For discussion of basic child custody and parenting time proceedings and the law governing third-party custody and visitation, see *Michigan Family Law Benchbook*, ch 3 - 4 (Institute for Continuing Legal Education, 1999). Child protective proceedings are the subject of Miller, *Child Protective Proceedings Benchbook (Revised Edition)* (MJI, 2004).

For discussion of general safety and case management concerns in domestic relations proceedings where violence is at issue, see Chapter 10. Property matters in divorce proceedings are the subject of Chapter 11. A discussion of personal protection orders and access to children appears at Section 7.7. Criminal sanctions for parental kidnapping are addressed in Sections 3.5 - 3.6.

12.2 Determining a Child's Best Interests in Custody Cases Involving Allegations of Domestic Violence

A. Statutory Provisions

*MCL 722.21 et seq.

The principal authority for resolving child custody disputes in Michigan is the Child Custody Act of 1970.* This Act directs that in establishing parental rights and duties as to custody of minor children, the "best interests" of the child control. MCL 722.25(1).

MCL 722.23 lists the following twelve best interest factors for Michigan trial courts to weigh in making child custody determinations:

> "As used in this act, 'best interests of the child' means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> "(a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> "(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> "(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> "(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> "(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> "(f) The moral fitness of the parties involved.
>
> "(g) The mental and physical health of the parties involved.
>
> "(h) The home, school, and community record of the child.
>
> "(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> "(j) *The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.*
>
> "(k) *Domestic violence, regardless of whether the violence was directed against or witnessed by the child.**
>
> "(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute." [Emphasis added.]

*This factor was added by a 1993 amendment to the statute.

Domestic violence is specifically listed in subsection (k) of the foregoing statute as a best interest factor for a trial court to weigh in a proceeding under the Child Custody Act. Additionally, domestic violence is relevant to

subsection (j) because it directly affects each party's willingness or ability to encourage the other's relationship with the child.

The Child Custody Act contains no definition of "domestic violence." For definitions that apply in other contexts, see Section 1.2.

In its *Michigan Custody Evaluation Model*, p 37 (October 1998), the State Court Administrative Office comments as follows:

> "The evaluator must consider any violence that has been directed against the child, witnessed by the child, and/or caused the child to suffer any emotional trauma. One of the most common forms of domestic violence is the emotional abuse inflicted upon a child while residing in an environment where violent acts occur or where there is a threat that a violent act may occur. The emotional abuse is a result of the fear that a child endures while awaiting the next abusive episode."

The *Michigan Custody Evaluation Model* has been superseded by the *Custody and Parenting Time Investigation Manual* (SCAO, 2002) (available online at www.courts.michigan.gov/scao/resources/publications/manuals/index.htm, last visited January 12, 2004). Although the text quoted above does not appear in the *Custody and Parenting Time Investigation Manual*, it is still relevant and may be helpful in making a custody determination.

B. Principles for Weighing the Best Interest Factors

Michigan courts have great discretion in applying the statutory best interest factors. MCL 722.23 contains no direction for courts in weighing each factor in relation to the others, other than to state that a child's "best interests" consist of the "sum total" of the listed factors. The Michigan appellate courts have likewise declined to adopt a bright-line, mathematical formula for making "best interest" determinations. See *Lustig v Lustig,* 99 Mich App 716, 731 (1980). In reviewing trial courts' best interest determinations, the Court of Appeals has held that:

- The statutory best interest factors need not be given equal weight. In *McCain v McCain,* 229 Mich App 123 (1998), the Court reviewed a custody award that was based on findings in favor of one party on three out of four factors on which the parties were not equivalent. The party who was awarded custody prevailed on factors (b), (c), and (h), while the appellant prevailed on factor (j), the "friendly parent" factor. With respect to factor (j), the Court of Appeals found that the party who was awarded custody would "go out of his way to try to destroy" the appellant's relationship with the children. The appeals panel upheld the trial court's custody award, however, concluding that it could not find support for the proposition that "a finding on one factor must completely countervail all the other findings." 229 Mich App at 131. Despite this holding, the panel nonetheless acknowledged that the statutory best interest factors need *not* be given equal weight:

> "Neither a trial court in making a child custody decision nor this Court in reviewing such a decision must mathematically assess equal weight to each of the statutory factors." 229 Mich App at 131.

See also *Streicher v Streicher,* 128 Mich App 5 (1983),* in which the Court of Appeals overturned the trial court's custody award, holding that the trial court had not properly weighed the abusive behavior of the party to whom custody had been awarded. The trial court had found the parties to be equal with respect to a majority of the best interest factors, including mental health. In reversing the trial court's custody award, the Court of Appeals held that the trial court's finding of equality with respect to mental health was against the great weight of evidence. The panel noted that "deciding what is in the best interests of the child . . . is much more difficult than merely tallying runs, hits, and errors in box score fashion following a baseball game." 128 Mich App at 14.

**Streicher* was decided before the 1993 addition of domestic violence to the list of best interest factors in MCL 722.23.

- When a party's behavior is relevant to more than one statutory factor, the trial court may consider it wherever necessary to make an accurate best interest assessment. In *Fletcher v Fletcher,* 229 Mich App 19 (1998), the defendant asserted that the trial court erroneously considered evidence of her negative influence on the children's relationship with their father under two best interest factors. The Court of Appeals found no error:

  > "[T]he factors have some natural overlap . . . . We conclude that, in order to accurately assess under factor (a) the emotional ties between the parties and the children, the trial court was free to consider defendant's influence on plaintiff's relationship with the children even though that evidence was also relevant under factor (j). We likewise find no merit in defendant's assertion that the trial court placed undue emphasis on this evidence." 229 Mich App at 25-26.

The trial court's findings on the best interest factors must be placed on the record so that they might be reviewed on appeal. In *Foskett v Foskett*, 247 Mich App 1, 9 (2001), the trial court concluded that "it appears that domestic violence plagues mother's home environment," based on information gained in in camera interviews with the children. This information was not placed on the record. The Court of Appeals reversed and remanded for further proceedings, stating that "[i]f a trial court relies significantly on information obtained through the in camera interview to resolve factual conflicts relative to any of the . . . best interest factors and fails to place that information on the record, then the trial court effectively deprives this Court of a complete factual record on which to impose the requisite evidentiary standard necessary to ensure that the trial court made a sound determination regarding custody." 247 Mich App at 10.

C. Applying Factor (k) — Domestic Violence

As MCL 722.23(k) recognizes, domestic violence is clearly relevant to the child's best interest in a proceeding under the Child Custody Act. As noted in Section 1.7, children are affected by adult domestic violence in several ways that subject them to devastating physical, emotional, cognitive, and behavioral effects that may be carried into their adult lives: 1) they witness it; 2) they are used by the abuser to control the victim; and 3) they suffer physical consequences incident to the adult violence. The physical consequences of domestic violence for children may involve accidental injury, homelessness, dislocation, or somatic complaints (e.g., frequent illness, sleep disorders, bedwetting). Additionally, children suffer an increased risk of physical abuse at the hands of domestic violence perpetrators. For a case involving spousal abuse in which the court considered the accompanying risk of child abuse in reaching a determination regarding access to children, see *Walsh v Walsh*, 221 F3d 204, 220 (CA 1, 2000). This case is discussed in detail in Section 13.18(C).

> **Note:** Factor (k) makes no distinction between domestic violence occurring between a child's biological parents and domestic violence occurring between a child's biological parent and the parent's new partner.

In 1994, the Board of Trustees of the National Council of Juvenile and Family Court Judges approved a Model State Code on Domestic and Family Violence* that can offer some guidance with respect to domestic violence as a factor in determining custody and parenting time (referred to as "visitation" in the Code). Section 402 of the Model Code provides as follows:

*The Model State Code is available online at www.ncjfcj.org/dept/fvd/publications (last visited January 17, 2004).

> "1. In addition to other factors that a court must consider in a proceeding in which the custody of a child or visitation by a parent is at issue and in which the court has made a finding of domestic or family violence:
>
> > "(a) The court shall consider as primary the safety and well-being of the child and of the parent who is the victim of domestic or family violence.
> >
> > "(b) The court shall consider the perpetrator's history of causing physical harm, bodily injury, assault, or causing reasonable fear of physical harm, bodily injury, or assault, to another person.
>
> "2. If a parent is absent or relocates because of an act of domestic or family violence by the other parent, the absence or relocation is not a factor that weighs against the parent in determining custody or visitation."

The foregoing provisions focus on three areas:

- **Safety**

  The Commentary to Section 402 explains that paragraph 1(a) "contemplates that no custodial or visitation award may properly issue that jeopardizes the safety and well-being of adult and child victims."

- **The history and patterns of abuse**

  The Model Code drafters recognize that domestic violence is a *pattern* of controlling behavior rather than any single action, and that abusers may direct their violent acts against persons other than the victim (e.g., children, friends, relatives) in order to exercise control over the victim.* Accordingly courts are urged to take the history and context of acts of abuse into account when making custody and parenting time determinations. Regarding paragraph 1(b), the Commentary states:

  > "Paragraph (b) compels courts to consider the history, both the acts and patterns, of physical abuse inflicted by the abuser on other persons, including but not limited to the child and the abused parent, as well as the fear of physical harm reasonably engendered by this conduct. It recognizes that discreet [sic] acts of abuse do not accurately convey the risk of continuing violence, the likely severity of future abuse, or the magnitude of fear precipitated by the composite picture of violent conduct."

*See Sections 1.2–1.5 for a discussion of the nature of domestic violence.

- **Victim flight**

  The Commentary to Section 402 of the Model Code addresses the issue of parental flight from abuse as follows:*

  > "Subsection 2 recognizes that sometimes abused adults flee the family home in order to preserve or protect their lives and sometimes do not take dependent children with them because of the emergency circumstances of flight, because the lack resources to provide for the children outside the family home, or because they conclude that the abuser will hurt the children, the abused parent, or third parties if the children are removed prior to court intervention. This provision prevents the abuser from benefiting from the violent or coercive conduct precipitating the relocation of the battered parent and affords the abused parent an affirmative defense to the allegation of child abandonment."

  Regarding flight from abuse, MCL 722.27a(6)(h) provides that "[a] custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent." For further discussion of this statute, see Section 12.7(B).

*More discussion about parental flight appears at Section 12.10.

D. Applying Factor (j) — The "Friendly Parent" Factor

The "friendly parent" factor, i.e., the "willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent," gives an advantage to the parent who appears most likely to promote continuing contact. This factor is based on the general assumption that having limited contact with one or both parents can result in a child experiencing adjustment difficulties after the parents separate. *Michigan Custody Evaluation Model, supra*, p 36.

When applying factor (j) in a case involving domestic violence, however, the assumption on which the factor is based must be carefully examined. Although contact with both parents can help children from non-violent families better adjust to a divorce, such contact may be more harmful than helpful in situations involving domestic violence. Research has shown that where severe conflict is present, the post-separation adjustment of children is facilitated by awarding sole custody to a non-abusive parent who offers a warm relationship, provides a predictable routine, imposes consistent, moderate discipline, and buffers the child against parental conflict and abuse. Appendix III to the Model Code on Domestic and Family Violence (National Council of Juvenile and Family Court Judges, 1994), citing Kelly, *Parental Conflict: Taking the Higher Road*, in Family Advocate (Winter, 1992), Furstenberg and Cherlin, *Divided Families: What Happens to Children When Parents Part* (Harvard University Press, 1991), and Wallerstein and Blakeslee, *Second Chances: Men, Women, and Children a Decade After Divorce* (Tichnor and Fields, 1990).

Moreover, domestic violence experts note with concern that when applied without regard to the presence of domestic violence in a relationship, "friendly parent" provisions such as factor (j) may impose an impossible situation upon a victim who opposes shared custody arrangements out of fear of further victimization, ultimately rewarding the abuser:

> "[F]ew courts even ask a mother why she may be discouraging the father's access to the children . . . . Every abused mother walks a tightrope. On the one hand, she must protect her children at the risk of the state's removing them or her being criminally prosecuted if she fails to protect them. On the other hand, she risks losing custody to her abuser if she protects her children by restricting the abuser's access to them. Friendly parent provisions punish her and the children if she even raises concerns about his fitness or parenting ability (or . . . if she opposes joint custody) because her very concern can be used as a weapon against her to deny her custody. Friendly parent provisions actually encourage abusers to continue to use the children as pawns in custody fights because even false allegations that a father was denied access to the children frequently result in the abuser's winning custody. Thus, friendly parent provisions, rather than being the benevolent

> facilitator of better parenting, actually have the likely effect of rewarding the less fit parent with sole custody.
>
> "[W]ell-intentioned efforts to promote better parenting through the use of friendly parent provisions and court orders providing that neither parent should disparage the other parent in front of the children have the unintentional results of keeping the abuse secret, reinforcing the abuser's right to perpetuate the violence, not holding the abuser responsible for his abuse (the first necessary step before he can recover), further victimizing the abused parent and greatly increasing the chance that the children will be permanently psychologically abused and become abusers as adults." Zorza, *Protecting the Children in Custody Disputes When One Parent Abuses the Other,* 29 Clearinghouse Review, 1113, 1122–1123 (April 1996).

As of the publication date of this benchbook, the Michigan appellate courts have not extensively discussed factor (j) in a context involving domestic violence. In *Bowers v Bowers*, 198 Mich App 320 (1993), the testimony in a proceeding to modify a custody order showed that the father threatened, berated, and insulted the mother in front of the children. Based partly on this testimony, the Court of Appeals found that factor (j) favored the mother, overturning the trial court's finding of equality on this factor as "against the great weight of the evidence." 198 Mich App at 332–333.

> **Note:** The Michigan Court of Appeals has held that a finding against a parent under factor (j) does not necessarily outweigh findings in favor of that parent on other factors. See *McCain v McCain,* 229 Mich App 123 (1998), discussed in Section 12.2(B).

12.3 Criminal Sexual Conduct Precluding an Award of Custody

If one of the parties to a custody dispute has been convicted of criminal sexual conduct, the Child Custody Act may preclude that party from obtaining custody of a child conceived during or victimized by the abuse.

MCL 722.25(2) provides that if a child is conceived as the result of acts for which one of the child's biological parents is convicted of first-, second-, third-, or fourth-degree criminal sexual conduct or assault with intent to commit criminal sexual conduct,* the court shall not award custody of the child to the convicted biological parent. This absolute prohibition does not apply if:

*These offenses are defined in MCL 750.520a to 750.520e and 750.520g.

- The conviction was for consensual sexual penetration (third-degree criminal sexual conduct) under MCL 750.520d(1)(a), involving a victim at least 13 years of age and under 16 years of age; or

- After the date of the conviction, the biological parents cohabit and establish a mutual custodial environment for the child.

MCL 722.25(3) provides that if one of the parties to a child custody dispute is convicted of criminal sexual conduct against his or her own child,* the court shall not award that party custody of the child or a sibling of the child without obtaining the consent of:

*The relevant offenses are defined in MCL 750.520a to 750.520e and 750.520g.

- The child's other parent; and
- The child or sibling if the court considers the child or sibling to be of sufficient age to express his or her desires.

Provisions substantially similar to those in the foregoing statute appear in the parenting time provisions of MCL 722.27a(5).* In *Devormer v Devormer*, 240 Mich App 601 (2000), the Court of Appeals held that MCL 722.27a(5) did not apply to preclude the defendant father from parenting time with his son after the father was convicted of criminal sexual conduct against his stepdaughter, who was the plaintiff mother's daughter and the son's half-sister. The Court held that the victim of the defendant's crime (i.e., the stepdaughter) was not his "child" for purposes of the statute. The Court reversed the trial court's decision to deny parenting time to the defendant based on the statute and remanded the case for a determination whether parenting time would be in the son's best interests.

*See Section 12.8(A) for information on denying parenting time.

12.4 Joint Custody

Under MCL 722.26a(7), "joint custody" refers to court orders specifying:

> "(a) That the child shall reside alternately for specific periods with each of the parents [and/or]
>
> "(b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child."

This section describes the standard for the court's joint custody determination under MCL 722.26a and addresses concerns with this standard that arise in cases involving allegations of domestic violence.

A. Standard for Joint Custody Determinations

In cases where the statutory prohibitions on custody awards to persons convicted of criminal sexual conduct do not apply,* MCL 722.26a sets forth the following standard for issuing an order for joint custody:

*These prohibitions are discussed in Section 12.3.

"(1) In custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request.* In other cases joint custody may be considered by the court. The court shall determine whether joint custody is in the best interest of the child by considering the following factors:

(a) The [best interest] factors enumerated in [MCL 722.23].

(b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.

"(2) If the parents agree on joint custody, the court shall award joint custody unless the court determines on the record, based upon clear and convincing evidence, that joint custody is not in the best interests of the child."

*When a parent requests joint custody, the court must apply the statutory best interest factors and state the reasons for denying the request on the record. *Mixon v Mixon*, 237 Mich App 159, 163 (1999).

MCL 722.26a creates no presumption in favor of joint custody. *Wellman v Wellman,* 203 Mich App 277, 286 (1994). However, the statute encourages joint custody awards by requiring courts to notify the parties of this option, and by requiring "clear and convincing evidence" to overcome the parties' agreement on joint custody.

In cases where domestic violence is present, joint custody awards raise serious concerns for the safety of the victim and the welfare of the parties' children. The Model State Code on Domestic and Family Violence approved in 1994 by the Board of Trustees of the National Council of Juvenile and Family Court Judges provides the following presumptions concerning custody in cases involving domestic violence:

- **Rebuttable presumption against joint custody or sole custody to the abusive parent:**

  "In every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence." Model Code, Section 401.

- **Rebuttable presumption in favor of residence with the non-abusive parent:**

  "In every proceeding where there is at issue a dispute as to the custody of a child, a determination by a court that domestic or family violence has occurred raises a rebuttable presumption that it is in the best interest of the child to reside with the parent who is not a perpetrator of domestic or

family violence in the location of that parent's choice, within or outside the state." Model Code, Section 403.

Although Michigan has not adopted the presumptions contained in the foregoing Model Code provisions, it can address the concerns that form the basis for these presumptions within the context of the joint custody statute (MCL 722.26a). The joint custody statute requires the court to consider:

- The best interest factors of MCL 722.23, and
- The parties' ability to "cooperate and generally agree concerning important decisions affecting the welfare of the child."

B. The Best Interests of the Child in Joint Custody Determinations

In deciding whether joint custody is appropriate, MCL 722.26a(1)(a) requires a trial court to consider the best interest factors in MCL 722.23. In cases involving allegations of domestic violence, factors (j) ("the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship") and (k) (domestic violence) are particularly relevant.*

*For a general discussion of how these best interest factors are weighed, see Section 12.2.

With respect to best interest factor (j), some researchers who study the effects of divorce on children have found that joint custody is appropriate for parents who are: 1) committed to making it work out of love for their children; 2) willing and able to negotiate differences; and 3) able to separate their spousal roles from their parental roles. Because relationships where domestic violence is present rarely exhibit such characteristics, these researchers generally advise against joint custody arrangements for them.*

*Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse,* 39 Social Work 51, 56 (1994).

Best interest factor (k) requires the court to consider whether an award of joint custody will result in a child's continued exposure to domestic violence. The deleterious effects of adult domestic violence on children who are exposed to it are well-documented by researchers and addressed in Section 1.7. Indeed, some commentators caution that continued aggression and violence between divorced spouses with joint custody has the most adverse consequences for children of any custody option. It can result in the short term in emotional and physical problems leading to poor school performance, running away, and delinquency. In the long term, it can result in the children themselves becoming caught in the cycle of violence.*

*Herrell & Hofford, *Family Violence: Improving Court Practice,* 41 Juvenile & Family Court Journal 19-20 (1990).

Some researchers have concluded that "high conflict" parents should be allowed to develop separate parenting relationships with their children, noting that frequent visits and joint custody schedules offer increased opportunity for verbal and physical abuse. More frequent transitions between "high conflict" parents were related to more emotional and behavioral problems for the children. See Saunders, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Research Findings, and Recommendations,* (August 1998) at www.vawnet.org/DomesticViolence/Research/

VAWnetDocs/AR_custody.php (last visited January 7, 2004). If joint custody results in difficulties for the children of "high conflict" parents, it is likely to be especially problematic in custody cases involving domestic violence. Indeed, domestic violence continues — and may escalate — after separation and divorce as the abusive party seeks to reassert control in the relationship. *Id*. See also Section 1.4(B) on separation violence and lethality. In cases where domestic violence is present, the parental interactions required for joint custody arrangements may endanger parents and children by creating opportunities for continued abuse.

> **Note:** An order for joint custody in Michigan may make it more cumbersome for an abused parent to move to a location that is safe from the threat of domestic violence. MCL 722.31 imposes restrictions on changes in a parent's legal residence after issuance of a court order governing custody. These restrictions do not apply if the order grants sole legal custody to one of the parents. This statute is discussed in more detail in Section 12.6.

If the court decides that joint custody is not appropriate due to parental conflict, it will have to determine which parent should be awarded sole custody. Social science research indicates that men who batter should rarely have sole or joint custody of their children. Saunders, *Child Custody and Visitation Decisions in Domestic Violence Cases, supra.* In practice, however, commentators have pointed out that abused parents who oppose joint custody may risk being labelled "unwilling . . . to facilitate a close and continuing parent-child relationship" under best interest factor (j), and thus may risk being placed at a disadvantage with respect to the court's determination as to sole custody. This risk of being characterized as an "unfriendly parent" may lead some parties to acquiesce to unsafe joint custody arrangements. Hardcastle, *Joint Custody: A Family Court Judge's Perspective,* 32 Family Law Quarterly 201, 214-218 (1998). Best interest factor (j) is only one of 12 factors for the court to consider in making its custody determinations, however. If a party's opposition to joint custody is motivated by fear of abuse at the hands of the other party, Michigan courts have enough discretion in weighing the best interest factors to reach a safe, equitable outcome. See Section 12.2 on weighing the best interest factors.

C. Parental Cooperation

In addition to the best interest factors discussed in Section 12.4(B), the joint custody statute requires the trial court to consider the parties' ability to "cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1)(b). There is no Michigan statutory or appellate case authority addressing the issue of parental cooperation in the context of domestic violence. Researchers studying the dynamics of domestic violence have concluded that cooperation is not a characteristic of relationships where it is present. See Saunders, *Child Custody and Visitation Decisions in Domestic Violence Cases, supra*, citing a study showing that "highly conflictual parents" had a poor prognosis for becoming cooperative parents.*

*The cited study was Johnston, *Research Update: Children's Adjustment in Sole Custody Compared to Joint Custody Families & Principles for Custody Decision Making*, 33 Family & Conciliation Courts Review 415-425 (1995).

In cases where cooperation is not possible, requiring the parties to do so can have dangerous and inequitable effects on both the abused party and the children involved. It is not unusual to find the following dangerous situations arising in domestic relations cases where both violence and access to children are at issue:

- An abusive party uses protracted litigation over access to children as a means to continue asserting power and control over a former partner.
- An abusive party uses the contact required for the exchange of children as an opportunity for further mental or physical abuse.
- An abusive party uses children as instruments of abuse, e.g., by conveying threats through children, or by interrogating children about a former partner's activities.
- An abusive party abuses or abducts children as a means of asserting power and control over a former partner.
- An abused party who does not feel safe may flee with children to escape an abuser.

As noted in Section 12.4(B), workable joint custody arrangements require parents who are willing and able to cooperatively negotiate their differences. The failure of cooperation that characterizes many violent relationships makes them poor candidates for joint custody awards.

D. Joint Custody Agreements

Joint custody agreements are encouraged under the Child Custody Act. The Act provides that the court may only refuse to issue an order in accordance with the parties' agreement to joint custody if it determines in light of clear and convincing evidence on the record that the terms are not in the best interests of the child. MCL 722.26a(2). This statute does not mean that a trial court must uphold the parties' stipulations without making an independent determination as to the best interests of their children, however. In *Phillips v Jordan*, 241 Mich App 17, 21 (2000), the Court of Appeals stated:

> "While trial courts try to encourage parents to work together to come to an agreement regarding custody matters . . . [t]he trial court cannot blindly accept the stipulation of the parents, but must independently determine what is in the best interests of the child."

See also *Koron v Melendy*, 207 Mich App 188, 191 (1994) ("Implicit in the trial court's acceptance of the parties' custody and visitation arrangement is the court's determination that the arrangement struck by the parties is in the child's best interest.") and *Napora v Napora*, 159 Mich App 241, 246 (1986) ("Although stipulations are favored by the judicial system and are generally upheld, a parent may not bargain away a child's right by agreement with a former spouse.")

It is particularly important that courts make an independent determination of the child's best interests in cases involving allegations of domestic violence. As discussed in Section 1.7, domestic violence has a profound impact upon children. Moreover, stipulations between abused and abusive individuals may not contain mutually-agreed terms. In many relationships where domestic violence is present, there is an unequal balance of power or bargaining capability between the parties. In some cases, the imbalance may be so great that the abused individual's agreement to joint custody will be the product of coercion or fearful acquiescence. The abused individual may agree to an unsafe joint custody arrangement under threat of physical violence, or out of fear of losing access to children in a trial over sole custody.*

*See Herrell & Hofford, *supra,* p 20.

> **Note:** The extent to which a court must make independent best interest findings in cases involving stipulations appears to depend on whether the stipulation is part of the original judgment of divorce or part of a post-judgment modification. On post-judgment agreements to modify custody, a trial court must independently reexamine and make findings on each "best interest" factor. On original judgments of divorce, the trial court need not expressly articulate each of the best interest factors. *Koron v Melendy, supra*, 207 Mich App at 192.

12.5 Modifying Michigan Custody Determinations

A. Standard for Modification

MCL 722.27(1)(c) governs modification of Michigan custody determinations as follows:

> "(1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:

. . .

> "(c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age and, subject to . . . MCL 552.605b,* until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered."

*The referenced statute addresses post-majority child support.

Under the foregoing statute, the moving party must make a threshold showing of proper cause or change of circumstances. Once a party has made this showing, the court will determine whether an established custodial environment exists. If no established custodial environment exists, the court will consider whether a preponderance of the evidence indicates that a change of custody would be in the child's best interests. If an established custodial environment exists, the court will consider whether clear and convincing evidence shows that a change would be in the child's best interests.* *Hayes v Hayes,* 209 Mich App 385, 387 (1995); *Rossow v Aranda,* 206 Mich App 456, 458 (1994).

*See Section 12.5(B) for discussion of the effect of PPOs and other court orders on the established custodial environment.

1. "Proper Cause" or "Change of Circumstances"

In *Vodvarka v Grasmeyer*, 259 Mich App 499, 512 (2003), the Court of Appeals provided the following guidance to trial courts in determining when "proper cause" exists:

> "In summary, to establish 'proper cause' necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors,* and must be of such magnitude to have a significant effect on the child's well-being. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors."

*See Section 12.2(A) for a listing of the "best interest" factors.

The Court also stated that in order to establish a "change of circumstances," the petitioner must prove "that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id.* at 513. In contrast, in order to determine whether "proper cause" exists, a trial

court may on rare occasions be required to take testimony of events occurring prior to the prior court order. The Court stated:

> "[P]roper cause is geared more towards the significance of the facts or events or, as stated earlier, the appropriateness of the grounds offered. However, we believe a party would be hard-pressed to come to court after a custody order was entered and argue that an event of which they were aware (or could have been aware of) before the entry of the order is thereafter significant enough to constitute proper cause to revisit the order. However, there can be such situations." *Id.* at 515.

As of the publication date of this benchbook, no Michigan statute or appellate decision directly addresses the relevancy of domestic violence to a party's threshold showing of "proper cause" or "change of circumstances" under MCL 722.27(1)(c). However, a showing that a party entered into a stipulation regarding custody as a result of duress or coercion may suffice to establish proper cause for a change of custody. See *Rossow v Aranda, supra,* 206 Mich App at 457.

Under the Model Code on Domestic and Family Violence, approved in 1994 by the Board of Trustees of the National Council of Juvenile and Family Court Judges, a finding of domestic violence occurring since a prior custody determination constitutes a change of circumstances:

> "In every proceeding in which there is at issue the modification of an order for custody or visitation of a child, the finding that domestic or family violence has occurred since the last custody determination constitutes a finding of a change of circumstances." Model Code, Section 404.

2. Best Interests of the Child

Since 1993, domestic violence has been listed as a best interest factor under MCL 722.23(k), so that the court must consider it once the party seeking modification makes the threshold showing of "proper cause" or "change of circumstances."* The following Court of Appeals cases consider violence as a best interest factor in the context of requests for changes in custody. These cases were decided before domestic violence was added to the list of best interest factors in 1993, however.

*See Section 12.2 for more discussion of weighing the "best interest" factors.

- *Harper v Harper*, 199 Mich App 409, 417–419 (1993):

  The Court of Appeals in this case upheld the trial court's decision awarding physical custody of the parties' two sons to the plaintiff father. According to the evidence presented, the defendant mother struck and shoved the plaintiff many times in the presence of their children. She once forced her way into his truck and reached through the truck window to slap him. A social worker testified that these incidents of aggression "contributed to the children's inability at self-control." 199 Mich App at

419. Another witness, the plaintiff's 13-year-old daughter, testified that the defendant pressured her to stay with the defendant and became histrionic when the witness would not do so. This witness further testified that the defendant followed her to her room after a confrontation and threatened to slash her wrists with a razor blade if the witness would not say she loved her. Certain expert testimony showed that the defendant suffered from a borderline personality disorder. *Id.* There was also evidence of the defendant's neglect of the children, which the Court of Appeals characterized as "serious lapses of judgment." 199 Mich App at 417. Based on the evidence presented, the Court of Appeals upheld the trial court's analysis of the mother's behavior under factor (g) (the mental and physical health of the parties), in which the trial court found that the defendant's mental health was inferior to the plaintiff's.

- *Troxler v Troxler*, 87 Mich App 520, 524 (1978):

  A divorce judgment awarded custody of the parties' three children to their mother. The trial court subsequently granted a motion by the children's father for a change in custody to him. On appeal, a majority of the Court of Appeals found that the evidence supported the trial court's decision to grant custody to the father. The trial court found in favor of the father on stability of environment, permanence of the home as a family unit, and moral fitness. It also found that the children were doing well in school and receiving proper care in their father's home. The trial court was further influenced by the mother's testimony that her new husband had struck her and "pretty near knocked her teeth out." She also testified that the children's father had sent her a blank check while she was cohabiting with her new husband prior to their marriage, so that she could move out with the children into a place of their own.

Equality on the best interest factors does not preclude the moving party from meeting the clear and convincing burden of proof required to support a change from an established custodial environment. In *Heid v AAASulewski (After Remand),* 209 Mich App 587, 594-596 (1995), the original divorce judgment awarded joint legal custody of a child to both parents, with sole physical custody to the mother. Following allegations of child abuse, temporary physical custody of the child was granted to the father, with supervised visitation by the mother. The child remained in the father's temporary physical custody from June 1990 to April 1992, during which time the mother severed her relationship with a boyfriend who was suspected of the abuse. In April 1992, the circuit court determined that both parties should have joint legal and physical custody. The court found that the statutory best interest factors did not significantly favor either party, but that the mother had met her burden to prove by clear and convincing evidence that a change in custody was justified. The circuit court stated:

> "[T]he Court [is] convinced that [the mother] is capable of giving love and care to the child and that the good of the child would be better served if both parents had the realization that they were both

> the legal and physical custodians of the child." 209 Mich App at 593.

Disapproving *Arndt v Kasem*, 135 Mich App 252 (1984), the Court of Appeals affirmed the circuit court's decision. The panel held that a finding of mathematical equality or near equality on the best interest factors set forth in MCL 722.23 does not necessarily amount to an evidentiary standoff that precludes a party from satisfying the clear and convincing standard of proof required to change an established custodial environment under MCL 722.27(1)(c). 209 Mich App at 596.

B. PPOs and the Established Custodial Environment

Because a PPO may affect the parties' access to children — particularly if it excludes a parent from premises — it may as a practical matter grant custody to one parent. This reality is likely to have significant implications for any future domestic relations proceedings between the parties because it creates a situation that could potentially ripen into an established custodial environment. See *Blaskowski v Blaskowski*, 115 Mich App 1, 7 (1982).

Generally, once an established custodial environment exists, a court may not modify an existing custody or parenting time order to change it unless the party seeking the change shows clear and convincing evidence that it is in the child's best interests. MCL 722.27(1)(c). The Michigan Supreme Court has held that this restriction serves a legislative policy "to minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an established custodial environment, except in the most compelling cases." *Baker v Baker,* 411 Mich 567, 577 (1981). However, a court may change custody or parenting time in the provisions of a PPO, without considering the best interest factors contained in MCL 722.27(1)(c). *Brandt v Brandt*, 250 Mich App 68 (2002).* In *Brandt,* the trial court entered a PPO prohibiting the respondent from contacting his children. 250 Mich App at 69. The trial court later modified the PPO to allow the respondent parenting time with his children. The respondent argued on appeal that the trial court did not have the authority to modify a PPO to include parenting time. The respondent asserted that custody and parenting time determinations may only be made in a child custody proceeding after a court has examined the "best interests of the child" factors. The Court of Appeals upheld the trial court's order, indicating that a trial court may restrain individuals from doing certain acts under MCL 600.2950(1). The Court further stated that MCL 600.2950(1)(j), the "catchall" provision, clearly provides a trial court with the authority to restrain a respondent from any action that "interferes with personal liberty" or might cause "a reasonable apprehension of violence." 250 Mich App at 70. The Court stated:

*See Section 6.3(B) for a detailed discussion of the *Brandt* case.

> "This statutory provision allows the trial court to restrain respondent from 'any other specific act or conduct . . . that causes a reasonable apprehension of violence.' [MCL 600.2950(1)(j)]. There is no question that it would be reasonable for petitioner to

> fear that respondent might become violent with petitioner if she were forced to permit respondent to visit the children or exchange the children for parenting time. Additionally, this interpretation is entirely consistent with the remainder, of the statute, which makes it clear that the Legislature recognized that access to the children may need to be restrained to protect the safety of a parent. See MCL 600.2950(1)(d), (f) and (h)." 250 Mich App at 70–71.

*See Section 10.7 for a comparison of domestic relations orders and PPOs.

A PPO's potential effect on access to children makes it tempting for some parties to use it to gain an advantage in domestic relations proceedings. To avoid such manipulations, a court should carefully consider petitions that would interfere with the respondent's parental rights, keeping in mind that domestic relations proceedings are better suited for resolving disputes over access to children.* If the PPO court finds that interference with the respondent's parental rights is necessary to protect the petitioner, however, a domestic relations court may subsequently find itself deciding the effect of the PPO on the child's custodial environment in a proceeding to modify custody.

The question whether an established custodial environment exists is one of fact for the trial court to resolve based on the statutory criteria. *Hayes v Hayes,* 209 Mich App 385, 387-388 (1995). The statutory criteria do not allow a court to consider how the custodial environment came into being; rather, the focus is on the circumstances surrounding the care of the children in the time preceding the court's determination in a particular case. 209 Mich App at 388. In *Blaskowski v Blaskowski, supra,* 115 Mich App at 6, the Court of Appeals explained:

> "If the trial court determines that an established custodial environment in fact exists, it makes no difference whether that environment was created by a court order, whether temporary or permanent, or without a court order, or in violation of a court order, or by a court order which was subsequently reversed."

Application of the foregoing principles is illustrated by *Baker v Baker, supra.* In this case, the Michigan Supreme Court held that two temporary custody orders did not, of themselves, create an established custodial environment. Instead, such an environment depended upon:

> "a custodial relationship of a significant duration in which [the child] was provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence." 411 Mich at 579-580.

Applying this standard, the Court concluded that a child's established custodial environment had been destroyed in a case where he experienced repeated custodial changes and geographical moves after the breakup of his

parents' marriage. Long-term community contacts in the father's location were not sufficient to preserve his father's home as an established custodial environment where there was "no 'appreciable time [during which] the child naturally look[ed]' to his father *alone* 'for guidance, discipline, the necessities of life and parental comfort' in a stable, settled atmosphere . . . ." 411 Mich at 582. [Emphasis in original.]

See also *Pluta v Pluta,* 165 Mich App 55, 60 (1987) ("[A]n order for temporary custody does not, by itself, establish a custodial environment. The trial court must look at the total custodial relationship.") and *Hayes v Hayes, supra,* 209 Mich App at 388 ("Where there are repeated changes in physical custody and there is uncertainty created by an upcoming custody trial, a previously established custodial environment is destroyed and the establishment of a new one is precluded."). For further cases addressing the effect of prior custody orders on the established custodial environment, see *Michigan Family Law Benchbook,* §3.3 (Institute for Continuing Legal Education, 1999).

12.6 Change of Legal Residence

MCL 722.31 imposes restrictions on changes in a parent's legal residence after issuance of a court order governing custody. The statute provides:

> "A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued." MCL 722.31(1).

The statute does not apply in the following circumstances:

- The custody order grants sole legal custody to one of the parents. MCL 722.31(2).
- The child's two residences were more than 100 miles apart at the time of the commencement of the action in which the custody order is issued. MCL 722.31(3).
- The change of legal residence will result in the child's two legal residences being closer together than they were before the change. *Id*.
- Orders determining or modifying child custody or parenting time shall include a provision stating the parents' agreement as to how a change in either of the child's legal residences will be handled. MCL 722.31(5). If a residence change is done in compliance with this agreement, the statutory restrictions do not apply. *Id*.

In circumstances where the statute applies, a parent's change of residence may be excused from the 100-mile restrictions if the other parent consents to the

change of residence. MCL 722.31(2). Otherwise, a court order is needed to permit the residence change. *Id*.

In deciding whether to permit a residence change, the court must make the child the primary focus in its deliberations. MCL 722.31(4). This provision further sets forth the following factors for the court to consider before permitting a legal residence change:*

> "(a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
>
> "(b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.
>
> "(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.
>
> "(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.
>
> "(e) *Domestic violence, regardless of whether the violence was directed against or witnessed by the child.*" [Emphasis added.]

*See *Mogle v Scriver*, 241 Mich App 192, 202-203 (2000), for a case applying similar factors before the effective date of the statute.

If the statutory restrictions apply to a change of a child's legal residence and the parent seeking the change needs to find a safe location from the threat of domestic violence, the parent may move to the safe location with the child until the court makes a determination under the statute. MCL 722.31(6).

If the parents cannot reach agreement as to how a change in the child's legal residences will be handled, a custody order regarding the child shall include a provision stating: "A parent whose custody or parenting time of a child is governed by this order shall not change the legal residence of the child except in compliance with section 11 of the 'Child Custody Act of 1970', 1970 PA 91, MCL 722.31." MCL 722.31(5).

12.7 Parenting Time

Parenting time in cases involving domestic violence is governed by MCL 722.27a, which contains the following provisions of particular interest:

- Parenting time is to be granted "in accordance with the best interests of the child." A strong relationship with both parents is presumed to be in a child's best interest, so that absent clear and convincing evidence of danger to the child's physical, mental, or emotional health, a child has a right to parenting time with a parent. MCL 722.27a(1), (3). See also *Rozek v Rozek*, 203 Mich App 193 (1993).
- In ordering terms for parenting time, the court may consider whether the exercise of parenting time presents a reasonable likelihood of abuse or neglect of the child, or abuse of a parent. MCL 722.27a(6)(c)–(d).
- Persons convicted of criminal sexual conduct may in some cases be denied parenting time with children conceived during or victimized by the offense. MCL 722.27a(4)–(5).

Under the foregoing provisions, the presence of domestic violence will not preclude a court from ordering parenting time unless:

- There is clear and convincing evidence of danger to the child's physical, mental, or emotional health, MCL 722.27a(3), or
- The parenting time would be with a parent convicted of criminal sexual conduct, under the circumstances set forth in MCL 722.27a(4)–(5).

This section will address cases in which there are no facts present that would preclude a court from ordering parenting time under MCL 722.27a(3)–(5).* The topics covered include domestic violence as a best interest factor and parenting time terms that promote safety, fairness, and accountability. This section also includes a sample parenting time questionnaire for the parties and sample parenting time provisions.

*See Section 12.8 on such cases.

A. Domestic Violence as a Factor in Granting Parenting Time

Domestic violence, "regardless of whether . . . directed against or witnessed by the child," is clearly relevant to a child's well-being and is listed in MCL 722.23(k) as one of 12 factors to be considered in the court's "best interest" determination. In weighing the 12 best interest factors, no single factor raises any presumption with respect to the court's determination; all relevant factors are to be considered together to reach a "sum total." For more discussion of how courts are to weigh and apply the statutory "best interest" factors, see Section 12.2.

In addition to the "best interest" factors in MCL 722.23, the parenting time statute contains a basic general presumption that it is in the best interests of a child to have "a strong relationship with both of his or her parents." MCL 722.27a(1). The statute further provides that "[a] child has a right to parenting time with a parent." MCL 722.27a(3). Therefore, unless a statutory exception applies (for cases involving danger to the child or criminal sexual conduct), the court must grant parenting time "in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." MCL 722.27a(1). The parenting time

statute allows the court flexibility to tailor the terms of its order to address the needs of the parties and the child.

*Lemon, *Domestic Violence & Children: Resolving Custody & Visitation Disputes*, p 57–59 (Family Violence Prevention Fund, 1995). See Section 12.4 on joint custody, and 1.5 on abusive tactics.

As of the publication date of this benchbook, no Michigan appellate court decisions directly address the role of domestic violence as a "best interest" factor in granting parenting time. Some commentators have noted that court orders for parenting time in cases involving domestic violence are subject to the same concerns that arise with regard to orders for joint custody, namely:*

- An abuser's exercise of parenting time can pose potential danger to a child or former intimate partner. Abusers may use parenting time as a tool for emotional abuse. They may, for example, institute disputes over parenting time as a means to harass a former partner, or they may use parenting time as an opportunity to recruit the children to collect information about the former partner. Furthermore, parenting time can give abusers physical access to children and former partners, which creates opportunities for physical abuse.
- Continued aggression and violence between divorced spouses has adverse consequences for children. It can result in the short term in emotional and physical problems leading to poor school performance, running away, and delinquency. In the long term, it can result in the children themselves becoming caught in a cycle of violence.

In response to the foregoing concerns, the Board of Trustees of the National Council of Juvenile and Family Court Judges approved the following provision, which appears in the Model Code on Domestic and Family Violence (1994):

> "A court may award visitation by a parent who committed domestic or family violence only if the court finds that adequate provision for the safety of the child and the parent who is a victim of domestic or family violence can be made." Model Code, Section 405(1).

The commentary to this provision states:

> "The Model Code posits that where protective interventions are not accessible in a community, a court should not endanger a child or adult victim of domestic violence in order to accommodate visitation by a perpetrator of domestic or family violence. The risk of domestic violence directed both towards the child and the battered parent is frequently greater after separation than during cohabitation; this elevated risk often continues after legal interventions."

The following discussion addresses how courts can craft parenting time orders that promote safety, fairness, and accountability.

B. Terms for Parenting Time

The parenting time statute gives the court great flexibility to order parenting time terms. If carefully and specifically drafted in accordance with the statute, a parenting time order can promote safety as it encourages a child's relationship with both parents.

MCL 722.27a(6) lists nine factors for the court to consider in determining the frequency, duration, and type of parenting time to be granted. Three of these factors require the court to determine the reasonable likelihood of abuse against a child or a parent resulting from the exercise of parenting time. The nine factors are:

> "(a) The existence of any special circumstances or needs of the child.
>
> "(b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.
>
> "(c) *The reasonable likelihood of abuse or neglect of the child during parenting time.*
>
> "(d) *The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.*
>
> "(e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.
>
> "(f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.
>
> "(g) Whether a parent has frequently failed to exercise reasonable parenting time.
>
> "(h) *The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.**
>
> "(i) Any other relevant factors." [Emphasis added.]

*See Sections 3.5-3.6 and 12.10 on parental kidnapping.

For a case illustrating the application of these factors, see *Booth v Booth,* 194 Mich App 284, 292–293 (1992). At a bench trial in this divorce action, the plaintiff wife testified that the defendant had physically abused their son when he was an infant and emotionally abused her. She also testified that the defendant had been jailed for physically abusing her. Defendant denied the physical abuse of his wife although he admitted hitting his son at age five as

a disciplinary measure. The trial court awarded the parties joint legal custody of the parties' two children, with sole physical custody to plaintiff. Defendant was granted supervised visitation with the children. Among other issues raised on appeal, defendant asserted that the trial court erroneously ordered supervised visitation. The Court of Appeals upheld the order for visitation, noting that the trial court properly considered the likelihood of abuse or neglect under the applicable statute in determining the frequency, duration, and type of visitation.

In drafting an order for parenting time in cases where domestic violence is present, the court can promote safety by making its order highly specific. Clear, precise parenting time terms are more readily enforced by law enforcement officers and are more difficult for the parties to manipulate. The court may issue precise orders under MCL 722.27a(7)–(8), which permit either party to request at any time that parenting time be granted in specific terms and authorize the court to order "any reasonable terms or conditions that facilitate the orderly and meaningful exercise of parenting time by a parent . . . ." Under MCL 722.27a(8), specific terms for parenting time may include one or more of the following:

> "(a) Division of the responsibility to transport the child.
>
> "(b) Division of the cost of transporting the child.
>
> "(c) Restrictions on the presence of third persons during parenting time.
>
> "(d) Requirements that the child be ready for parenting time at a specific time.
>
> "(e) Requirements that the parent arrive for parenting time and return the child from parenting time at specific times.
>
> "(f) Requirements that parenting time occur in the presence of a third person or agency.
>
> "(g) Requirements that a party post a bond to assure compliance with a parenting time order.
>
> "(h) Requirements of reasonable notice when parenting time will not occur.
>
> "(i) Any other reasonable condition determined to be appropriate in the particular case."

Consistent with MCL 722.27a(8), the court might consider the following terms to enhance safe enforcement of its orders for parenting time in cases involving domestic violence:*

- Avoid non-specific provisions such as "reasonable parenting time," "parenting time as agreed by the parties," or "parenting time to be arranged later." The terms of a parenting time order should be stated unambiguously, with pick-up and drop-off locations, times, and days of the week clearly specified.
- Provide for supervised parenting time, with the supervising third-parties clearly identified. Establish conditions that clearly specify the responsibilities and authority of the supervisor during supervised parenting time. Order the abusive party to pay a fee to defray the costs. See Lovik, *Friend of the Court Domestic Violence Resource Book* (MJI, 2001), Section 4.8, for more discussion of supervised parenting time.
- Provide safe, neutral locations for parenting time, whether supervised or unsupervised.
- Specify how the parties may communicate with each other to make arrangements for parenting time (e.g., whether the parties or their attorneys may communicate by telephone, or whether written or electronic communication is permitted).
- Arrange parenting time so that the parties will not meet. Drop-off and pick-up times could be different for each party, so that one will have left the drop-off site before the other arrives.
- If the parties must meet to transfer children, require that the transfer take place in the presence of a third party and in a protected setting, such as a police station or public place.
- Start with short, daytime visits in a public place, and increase length only if things are going well. Place limits on overnight visits.
- Prohibit the noncustodial party from drinking or using drugs before or during parenting time.
- Require a bond to assure compliance with the court's order.
- Limit the abusive party's access to firearms. For a discussion of firearms restrictions in cases involving domestic violence, see Chapter 9.
- Permit refusal of parenting time upon violation of any condition the court imposes.
- Permit cancellation of parenting time if the noncustodial party is more than a specified number of minutes late.
- Specify the consequences of violating the court's order, and the steps that the aggrieved party should take in the event of a violation.
- Specify how disputes between the parties will be resolved.
- Assess whether one of the parties is at risk for abducting or fleeing with the children, and take steps to deter such behavior. For more information, see Section 12.10.
- Order the abusive party to successfully complete a batterer intervention program as a condition of parenting time. See Sections 2.3 - 2.4 for more information about such programs.

*Many of these suggestions are from Finn & Colson, *Civil Protection Orders: Legislation, Current Court Practice, & Enforcement*, p. 43 (Nat'l Inst of Justice, 1990), and Family Violence: A Model State Code, Section 405 (Nat'l Council of Juvenile & Family Court Judges, 1994).

- If the abused parent is in hiding from the abuser, keep the address of the abused parent and other identifying information confidential. See Sections 10.4 and 12.11 for more information about this subject.
- Build in automatic return dates for the court to review how its order is working.

In cases involving a personal protection order, the State Court Administrative Office's *Michigan Parenting Time Guideline* (2000) states (at p 26):

> "If the parties have a Personal Protection Order, parenting time exchanges shall occur (if permitted by the order) in a manner which ensures the order is not violated. In order to provide appropriate safety when a PPO is in place or when a documented history of abuse exists, all exchanges should occur in a public place, at a designated neutral exchange site, by a third party, or at a supervised parenting time facility."*

*See Section 7.7 for more on PPOs and access to children.

*Joint counseling is contra-indicated in cases involving domestic violence. See Section 2.4(B).

Section 405(4) of the Model Code on Domestic and Family Violence states that the court may refer, but shall not order, an abused parent to attend counseling relating to the abuse, either individually or with the abuser, as a condition of custody or parenting time. This provision recognizes that joint counseling with the perpetrator of domestic violence can be dangerous for the victim.* The commentary to Section 405(4) notes that this provision does not preclude the court from ordering other types of counseling, such as substance abuse counseling or educational classes.

*Finn & Colson, *supra,* at 44.

To expedite the issuance of parenting time orders, some commentators suggest providing the abused party with a short form questionnaire on which to record preferred arrangements.* For sample questions, see Section 12.7(C). Examples of specifically-worded parenting time terms appear at Section 12.7(D).

*See Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse, 39 Abuse,* 39 Social Work 51, 56 (1994), and Herrell & Hofford, *Family Violence: Improving Court Practice,* 41 Juvenile & Family Court J 20 (1990).

If the parties agree to parenting time terms, the court may only refuse to issue an order in accordance with their agreement if it determines in light of clear and convincing evidence on the record that the terms are not in the best interests of the child. MCL 722.27a(2). When applying this subsection to a case involving domestic violence, the court can promote safety and the best interests of the children by making careful inquiry into whether the parties have truly reached an agreement. When domestic violence is present, there is often an unequal balance of power or bargaining capability between the parties; in some cases, the imbalance may be so great that the victim's agreement to parenting time terms will be the product of coercion.* Michigan appellate cases addressing the trial court's obligation to review the parties' stipulations are discussed at Section 12.4(D).

C. Sample Parenting Time Questionnaire

The following questions are taken from Finn and Colson, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement*, p 45 (Nat'l Inst of Justice, 1990). Although these questions are suggested in the context

of civil protection order proceedings, they are also relevant to the issuance of parenting time orders.

To assist the court in issuing its order for parenting time, please answer the following questions:

- Do you believe that it may be dangerous for your child(ren) if your former spouse/partner is allowed to visit with them? If so, why may it be dangerous?
- Is there a safe place for your former spouse/partner to pick up the children?
  - Your home?
  - Your parents' home?
  - Church, synagogue, or other place of worship?
  - Police station?
  - Other? (fill in)_____
- Do you want someone else to be present when your former spouse/partner is with the children, such as grandparents or a clergy person? If so, who?
- When do you want your former spouse/partner to be able to visit with the children?
  - What day(s) of the week?
  - What time of day? From___ to____
  - How many times each month?
- Does your former spouse/partner have a drinking or drug problem? If so, do you want the order to provide that your former spouse/partner cannot visit with the children after drinking or taking drugs?
- Does your former spouse/partner carry or have access to weapons? If so, do you want the order to provide that your former spouse/partner cannot carry a weapon while visiting the children, or that visits with the children take place in a location where your former spouse/partner will have no access to weapons?

D. Examples of Specifically-Worded Parenting Time Terms

The following terms are adapted from Lemon, *Domestic Violence and Children: Resolving Custody and Visitation Disputes*, Appendix J (Family Violence Prevention Fund, 1995). The examples are drafted with the assumption that the abused individual is the plaintiff, the abuser is the defendant, and Mary Smith is a neutral third party.

1) Parenting time shall take place every first and third Saturday from 10 a.m. to 3 p.m., at the home of and in the presence of Mary Smith, plaintiff's aunt, at 123 Main Street, City. The plaintiff is responsible for dropping off the child by 9:45 a.m. and picking up the child at 3:15 p.m. If parenting time cannot take place, notice must be given by telephoning Mary Smith at (000) 123–4567 by

8:30 a.m., and parenting time shall then take place the following Saturday with the same provisions.

2) If defendant wishes to exercise parenting time rights, he must call Mary Smith at (000) 123–4567 by 10 a.m. the day before a scheduled visit. Mary Smith shall then call the plaintiff.

3) Defendant shall consume no alcohol or illegal drugs during the 12 hours prior to and during parenting time. If he appears to have violated this provision, Mary Smith is authorized to deny him parenting time that week.

4) Parenting time may be denied if the defendant is more than 30 minutes late and does not call by 8:30 a.m. to alert Mary Smith to this. *(This term prevents a custodial parent and child from waiting for the other parent.)*

5) Plaintiff must arrive at the drop-off location 20 minutes before defendant, and then leave before defendant arrives. At the end of parenting time defendant must remain at the location for 20 minutes while plaintiff leaves with the children. *(This term prevents defendant from following plaintiff to harass her or ascertain the location of her new residence.)*

6) *(If there is no third party available, even for exchanging the children):* Drop-off and pick-up of the children shall occur at the local police department, in the lobby. Defendant shall leave with the children immediately; plaintiff may request a police escort to her car or to public transportation. At the end of parenting time, defendant shall wait in the lobby at least 20 minutes while plaintiff leaves with the children. *(This term prevents defendant from following plaintiff to harass her or ascertain the location of her new residence.)*

For an example of a parenting time order with provisions designed to prevent abduction to a foreign nation, see *Farrell v Farrell,* 133 Mich App 502, 513, n 3 (1984).

12.8 Grounds for Denying Parenting Time

A. Criminal Sexual Conduct by a Parent

*These offenses are defined in MCL 750.520b to 750.520e and 750.520g.

MCL 722.27a(4) provides that if a child is conceived as the result of acts for which one of the child's biological parents is convicted of first-, second-, third-, or fourth-degree criminal sexual conduct or assault with intent to commit criminal sexual conduct,* the court shall not grant parenting time with the child to the convicted biological parent. This absolute prohibition does not apply if:

- The conviction was for consensual sexual penetration (third-degree criminal sexual conduct) under MCL 750.520d(1)(a), involving a victim at least 13 years of age and under 16 years of age; or
- After the date of the conviction, the biological parents cohabit and establish a mutual custodial environment for the child.

MCL 722.27a(5) provides that if an individual is convicted of first-, second-, third-, or fourth-degree criminal sexual conduct or assault with intent to commit criminal sexual conduct,* and the victim is the individual's child, the court shall not grant parenting time with that child or a sibling of that child without obtaining the consent of:

*These offenses are the same as those set forth in MCL 722.27a(4).

- The child's other parent; and
- The child or sibling if the court considers the child or sibling to be of sufficient age to express his or her desires.

In *Devormer v Devormer*, 240 Mich App 601 (2000), the Court of Appeals held that MCL 722.27a(5) did not apply to preclude the defendant father from parenting time with his son after the father was convicted of criminal sexual conduct against his stepdaughter, who was the plaintiff mother's daughter and the son's half-sister. The Court held that the victim of the defendant's crime (i.e., the stepdaughter) was not his "child" for purposes of the statute. The Court reversed the trial court's decision to deny parenting time to the defendant based on the statute and remanded the case for a determination whether parenting time would be in the son's best interest.

B. Danger to the Child's Physical, Mental, or Emotional Health

MCL 722.27a(3) provides that a child has a right to parenting time, "unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health."* As of the publication date of this benchbook, no Michigan appellate decisions have directly considered the issue of denying parenting time based upon this statutory provision.

*See Section 1.7 on the effects of domestic violence on children.

In *Rozek v Rozek*, 203 Mich App 193, 194–195 (1993), the Court of Appeals considered MCL 722.27a(3) on the issue of the standard of proof needed to show an endangerment of a child's physical, mental, or emotional health. After concluding the trial court improperly used a "preponderance of the evidence" standard rather than the required "clear and convincing evidence" standard, the Court remanded the matter to the trial court for a new hearing. The Court would not express an opinion on whether the record would have supported the trial court's termination of the father's parenting time under the proper standard of proof. It did, however, note that the statute permits a court to order parenting time with a multitude of terms and conditions to best protect and serve the interests of the child.

12.9 Civil Remedies to Enforce Michigan Parenting Time Orders

*On criminal sanctions for parental kidnapping, see Sections 3.5-3.6.

Under MCR 3.208(B), the Friend of the Court is responsible to initiate proceedings to enforce orders or judgments for custody or parenting time. Civil remedies to enforce parenting time orders are available under the Friend of the Court Act, MCL 552.501, et seq., and the Support and Parenting Time Enforcement Act, MCL 552.601 et seq.*

Under the Friend of the Court Act, the Friend of the Court office must initiate enforcement proceedings upon receipt of a written complaint stating specific facts that constitute a violation of a parenting time order. MCL 552.511b(1). A "parenting time violation" is defined as "an individual's act or failure to act that interferes with a parent's right to interact with his or her child in the time, place, and manner established in the order that governs . . . parenting time between the parent and the child and to which the individual accused of interfering is subject." MCL 552.602(e). If a parent has the right to interact with his or her child pursuant to a custody or parenting time order and requests assistance, the Friend of the Court must assist that parent in preparing a complaint. MCL 552.511b(1).

Within 14 days of the receipt of the complaint, the Friend of the Court must send a copy of the complaint to the individual accused of interfering with the order and to each party to the parenting time order. MCL 552.511b(2).

MCL 552.511b(3) provides:

> "If, in the opinion of the office, the facts as stated in the complaint allege a . . . parenting time order violation that can be addressed by taking an action authorized under section 41 of the support and parenting time enforcement act, MCL 552.641, the office shall proceed under section 41 of the support and parenting time enforcement act, MCL 552.641."

*See MCL 552.602(m) for the definition of "friend of the court case."

The Support and Parenting Time Enforcement Act, MCL 552.641(1), requires the Friend of the Court, for a "friend of the court case,"* to take one or more of the following actions in response to an alleged parenting time order violation:

- Apply a makeup parenting time policy under MCL 552.642.
- Commence civil contempt proceedings under MCL 552.644. If a parent fails to appear in response to an order to show cause, the court may issue a bench warrant, and, except for good cause shown on the record, shall order the parent to pay the costs of the hearing, the issuance of the warrant, the arrest, and further hearings. MCL 552.644(5).
- File a motion pursuant to MCL 552.517d for a modification of the existing parenting time provisions to ensure parenting time, unless it would be contrary to the best interests of the child.

- Schedule mediation pursuant to MCL 552.13.
- Schedule a joint meeting under MCL 552.542a.

Note: The Friend of the Court is generally required to open a case for domestic relations matters. MCL 552.505a(1). The case is referred to as a "friend of the court case." The parties to a domestic relations matter may opt out of having a Friend of the Court case opened by filing a motion with their initial pleadings. See MCL 552.505a(2). The court must allow the parties to opt out unless the court finds that "[t]here exists in the domestic relations matter evidence of domestic violence or uneven bargaining positions and evidence that a party to the domestic relations matter has chosen not to apply for title IV-D services against the best interest of either the party or the party's child." MCL 552.505a(2)(d).

MCL 552.641(2) permits the Friend of the Court to decline to take one of the foregoing actions if any of the following circumstances apply:

> "(a) The party submitting the complaint has previously submitted 2 or more complaints alleging custody or parenting time order violations that were found to be unwarranted, costs were assessed against the party because the complaint was found to be unwarranted, and the party has not paid those costs.
>
> "(b) The alleged . . . parenting time order violation occurred more than 56 days before the complaint is submitted.
>
> "(c) The . . . parenting time order does not include an enforceable provision that is relevant to the . . . parenting time order violation alleged in the complaint."

If the court finds that a parent has violated a parenting time order without good cause,* the court must find that parent in contempt. MCL 552.644(2). MCL 552.644(2)(a)–(h) provide that once the court finds a parent in contempt, it may do one or more of the following:

> "(a) Require additional terms and conditions consistent with the court's parenting time order.
>
> "(b) After notice to both parties and a hearing, if requested by a party, on a proposed modification of parenting time, modify the parenting time order to meet the best interests of the child.
>
> "(c) Order that makeup parenting time be provided for the wrongfully denied parent to take the place of wrongfully denied parenting time.
>
> "(d) Order the parent to pay a fine of not more than $100.00.
>
> "(e) Commit the parent to the county jail.

*"Good cause" includes, but is not limited to, consideration of the safety of a child or a party who is governed by the parenting time order. MCL 552.644(3).

> "(f) Commit the parent to the county jail with the privilege of leaving the jail during the hours the court determines necessary, and under the supervision the court considers necessary, for the purpose of allowing the parent to go to and return from his or her place of employment.
>
> "(g) If the parent holds an occupational license, driver's license, or recreational or sporting license, condition the suspension of the license, or any combination of the licenses, upon noncompliance with an order for makeup and ongoing parenting time.
>
> "(h) If available within the court's jurisdiction, order the parent to participate in a community corrections program established as provided in the community corrections act, 1988 PA 511, MCL 791.401 to 791.414."

The court must state on the record the reason it is not ordering a sanction listed in MCL 522.644(2)(a)–(h). MCL 552.644(3).

*See Section 2.1(A) for information on the Domestic Violence Prevention and Treatment Board.

MCL 552.641(3) requires courts to enforce parenting time violations in compliance with the guidelines developed by the Friend of the Court in cooperation with Domestic Violence Prevention and Treatment Board ("DVPTB")* as required in MCL 552.519. The Friend of the Court and DVPTB guidelines ("Guidelines") are found in SCAO Administrative Memorandum 2002-11. The Guidelines provide the following guidance in the selection of an enforcement remedy for a violation of a parenting time order:

*See Chapters 6-8 for information on PPOs.

> "Selection of an enforcement remedy should also be influenced by the safety concerns that arise when one party has committed a crime against a child or the other party, or has violated another court order (such as a personal protection order*) in exercising or asserting custody or parenting time rights. Cases in which parties are unable to adequately represent their own interests require special consideration to ensure fairness. The parties' ability to represent their own interests may be impeded by factors such as undue influence, substance abuse, mental illness, and domestic violence. In cases involving domestic violence, safety concerns arise in addition to questions of fairness. Efforts to promote safety in these cases will be most effective if they focus on the protection of the abused individual and children, and on intervention in the abusive parent's manipulation and control tactics. This focus will help the court to address the underlying basis for the problems caused by domestic violence in the case, rather than on the parenting time symptoms that arise from the violence. Other ways to promote safety include:
>
> - Minimize physical or other contact between the parties, and thus opportunities for threats, harassment, or physical violence.

- Adhere to any prior court orders restricting contact between the parties. Such orders may have been issued in criminal or civil cases in Michigan or another jurisdiction (Michigan courts must extend full faith and credit to protection orders issued in civil and criminal cases in other U.S. jurisdictions. See MCL 600.2950h, 600.2950j).*

- Communicate clearly with the parties about court processes, particularly with regard to the limits of confidentiality. Abused individuals need to know what use will be made of their disclosures of domestic violence in order to take safety precautions against potential retaliatory violence, which is often precipitated by such disclosures.

- Refer abused individuals to domestic violence service agencies that can assist with safety planning."* [Footnotes omitted.]

*See Chapter 13 for a discussion of providing full faith and credit to orders issued in both other U.S. jurisdictions and foreign jurisdictions.

*See Appendix A for a listing of domestic violence service agencies.

If the court finds that a party to a parenting time dispute has acted in bad faith, the court must order the party to pay a sanction and to pay the other party's costs. MCL 552.644(6) and MCL 552.644(8). The first time a party acts in bad faith the sanction may not exceed $250.00. The second time a party acts in bad faith the sanction may not exceed $500.00. Sanctions for any third or subsequent finding that a party has acted in bad faith may not exceed $1,000.00. MCL 552.644(6).

Courts can take the following steps in response to concerns about domestic violence in proceedings to enforce parenting time orders under the Friend of the Court Act and the SPTEA:

- Conduct ongoing screening for domestic violence in contested custody cases.
- In cases where domestic violence is present, deter disputes over parenting time by drafting specific orders that adequately address the abuse. Avoid provisions for "reasonable parenting time" or "parenting time as arranged by the parties," which are easily manipulated and thus likely to become vehicles for further abuse. See Section 12.7(B) on safe terms for parenting time.
- Do not require the parties to negotiate, arbitrate, or mediate their dispute, and carefully scrutinize any agreements resulting from these dispute resolution methods. The use of alternative dispute resolution in cases involving domestic violence raises serious safety and equitable concerns. To succeed, alternative dispute resolution methods require cooperation between parties with equal bargaining power; they cannot operate fairly in relationships that are characterized by an abusive party's one-sided exercise of power and control. Indeed, alternative dispute resolution may provide the abusive party with opportunities for further physical abuse, intimidation, or harassment. Moreover, domestic violence involves criminal behavior which as a matter of policy should not be the subject for negotiation between the perpetrator and victim. See Section 10.6 for more discussion of alternative dispute resolution.

- Communicate to the abusive party that enforcement of the court's order is the responsibility of the Friend of the Court, not the abused individual. Doing this may promote safety; some abusers may not engage in coercive behavior if they realize that the abused individual is not in a position to control efforts to enforce a custody or parenting time order.
- Refrain from changing an existing custody or parenting time order until investigation of the case is complete. The National Council of Juvenile and Family Court Judges suggests that noncompliance to avoid abuse should not be grounds for modification of custody in favor of an abusive party, particularly when the abused party is not available to explain the circumstances surrounding the noncompliance.*

*Herrell & Hofford, *Family Violence: Improving Court Practice,* 41 Juvenile & Family Court J 20 (1990).

A complete discussion of procedures for enforcing custody and parenting time orders is beyond the scope of this benchbook. For more discussion, see State Court Administrative Office, *Michigan Parenting Time Guideline,* p 29–31 (2000), *Custody and Parenting Time Investigation Manual* (SCAO 2002), and *Michigan Family Law Benchbook*, §§4.10–4.19 (Institute for Continuing Legal Education, 1999).

12.10 Preventing Parental Abduction or Flight

In cases where domestic violence is present, both the abuser and the victim may be at risk for taking physical control over children in violation of a court order for custody or parenting time:

- An abusive parent whose parental rights have been limited may abduct a child as a means of punishing or controlling the abused parent.
- An abused parent may feel unsafe with court-ordered terms for custody or parenting time and flee with a child to avoid contact with the abuser.

Courts can discourage abduction or flight if it identifies cases where children are at risk and takes preventive measures. Assessing and reducing the risk of parental abduction or flight is important because the children affected can suffer serious emotional and physical harm. Uprooted from family and friends, these children may be told that they are leaving their homes because a parent is dead or because a parent no longer loves them. They may be given new names and told not to reveal their true identities to anyone. In order to remain in hiding, a parent may fail to enroll a child in school or to seek necessary medical attention. In some cases, a parent's abduction or flight may entail a threat of physical violence to a child.

The court's best response to the problem of parental abduction or flight is to prevent the problem from arising in the first place — parents will not be so likely to take control over their children in violation of a custody or parenting time order if the order contains appropriate provisions for the safe exercise of parental rights.* Such orders can be issued only if the court has full information about the parties' situation. Accordingly, the prevention of parental abduction or flight can start with a court's efforts to screen contested custody cases to identify disputes in which children are at risk. See Section 10.3 on screening. Awareness of such cases enables the court to include preventive measures in its orders for custody or parenting time.

*See Sections 12.2-12.8, and Herrell & Hofford, *Family Violence: Improving Court Practice,* 41 Juvenile & Family Court Journal 20 (1990).

Note: If a parent abducts or flees with a child, the same criminal statutes apply regardless of the parent's motivation. See Sections 3.5 - 3.6 on Michigan's criminal penalties for parental kidnapping. Civil remedies to enforce Michigan parenting time orders are the subject of Section 12.9. Civil enforcement of other jurisdictions' custody orders is discussed in Chapter 13.

A. Risk Factors for Parental Abduction or Flight

When screening cases to assess the risk of parental abduction or flight, a number of factors can alert the court to potential danger. The presence of domestic violence between the parties to a child custody dispute is one factor that increases the risk of parental abduction or flight. As noted above, an abuser may abduct children as a means of asserting power in a relationship, and a victim may flee with children to find refuge from abuse. Other risk factors are as follows:

- A parent has previously abducted or threatened to abduct a child or has a history of hiding the child.
- A parent has no strong ties to the child's home jurisdiction.
- A parent has a strong support network, especially if it includes friends or family living in another jurisdiction.
- A parent has few financial ties to the geographical area where the child is living.
- A parent is engaged in planning activities, such as quitting a job, selling a home, terminating a lease, closing a bank account, making a maximum draw on a credit card, liquidating assets, hiding or destroying documents, applying for a passport, or undergoing plastic surgery.
- The parties' marriage has a history of instability.
- A parent shows disdain for the court's authority.
- A parent denies or dismisses the value of the other parent to the child. This parent may believe that he or she knows what is best for the child and cannot see how or why it is necessary to share parenting with the other parent.
- The child is very young. Young children are easier to transport and conceal, and they cannot tell others of their plight.

- A parent believes that the other parent has abused, neglected, or molested the child. This factor is particularly significant where the parent feels that authorities have dismissed the allegations as unsubstantiated and have taken no action to protect the child.
- A parent is mentally ill and suffers from irrational or psychotic delusions that the other parent will harm him or her and/or the child.
- A parent feels disenfranchised by the judicial system. Such parents may not have access to legal assistance due to lack of knowledge or financial need. Others may not have confidence in the ability of the judicial system to address their concerns.
- A parent has citizenship or ties to a nation that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction. (Recovery of children from non-member nations is extremely difficult.) For a list of member nations and more information about this Convention, see Sections 13.17-13.19.

  Note: Some of the foregoing factors are also indicative of a risk for engaging in lethal violence. See Section 1.4(B) for a list of lethality factors to consider in conjunction with the foregoing factors.

B. Preventive Measures

Once it has screened a contested custody case for the foregoing risk factors, a court can further assess the need for preventive measures by considering the likelihood of harm to the child and the chances of recovering the child. Depending upon the circumstances of the case, the court can take a number of preventive steps to deter violation:*

*The suggestions are taken from Rigler, *supra,* and Goelman, et al, *supra,* §§201, 208. See also *Farrell v Farrell*, 133 Mich App 502, 513, n 3 (1984) for an example of a parenting time order with provisions designed to prevent abduction to a foreign nation.

- Draft custody or parenting time orders that adequately address the violence between the parties. Such orders should be specific — orders for "reasonable parenting time" or "parenting time as arranged by the parties" are easily manipulable and so are likely to become vehicles for further abuse. See Section 12.7(B) on safe terms for parenting time.
- State the possible penalties for violating the court's order.
- Avoid orders for joint custody when there is hostility between the parents, especially if they live in different jurisdictions. See Section 12.4 on joint custody.
- Provide for supervised parenting time, with supervision by a neutral third party rather than by a party's family member. See Lovik, *Friend of the Court Domestic Violence Resource Book* (MJI, 2001), Section 4.8 on this subject.
- Prevent a party from removing a child from the child's home jurisdiction without the written consent of the other party or the court. See Section 12.6 on statutory restrictions on a parent's relocation.
- Require the visiting parent to give the custodial parent notice of where the children will be taken during parenting time.
- Order a parent who poses a flight risk to post a bond that would be forfeited to the other parent upon flight. The amount of the bond should be sufficient to cover enforcement and recovery costs.

- Order a parent who is visiting from a distant location to deposit plane tickets with the custodial parent prior to exercising parenting time.
- Give a copy of the custody order to school authorities, day care providers, and medical personnel with explicit instructions not to release the child or any of the child's records to the noncustodial parent.
- Provide culturally-sensitive services. See Section 2.5 for more information about this subject.
- Ensure that a thorough investigation of allegations of child or spousal abuse takes place.
- Appoint a guardian ad litem for the child.
- Teach older children how to find help if they are abducted.
- If possible, instruct relatives and others who might support a parent in hiding a child that they are criminally liable if they aid and abet a crime. If there is a risk that the child will be taken from the U.S. to another nation, inform potential support persons that their assistance in hiding the child abroad might result in their exclusion from entering the U.S.
- Order the at-risk parent to surrender the child's passport to the other parent prior to parenting time or have the child's and the at-risk parent's passports held by a neutral third party.
- Give copies of court orders to agencies that issue passports, with the request that the custodial parent be notified if the other parent attempts to obtain a passport without the certified written authorization of both parents or the court. The child's passport can be marked with a requirement that travel is not permitted without the same authorization. (This option may be inadequate for children with dual citizenship, as foreign embassies and consulates are not obligated to honor passport restrictions if the request is made by an ex-spouse who is a non-national. In these cases, require the person at risk for abducting the child to request and obtain assurances of passport control from his or her own embassy before being granted unsupervised visitation with the child.)
- If there is a risk that the child will be taken from the U.S. to another nation, have the parties enter into a stipulation that neither of them will request travel documents for the child, with the understanding that a copy of the stipulation, properly sealed, will be delivered to all the appropriate offices of the other nation in the U.S., Canada, and Mexico, with a cover letter stating that both parties wish that the stipulation be followed.
- Where there is a risk of abduction to a foreign nation, suggest that the parties petition a court in the foreign nation for an order that parallels the provisions of the U.S. court order and that can be enforced in the foreign nation.

Another way for the court to limit the harmful effects of parental abduction or flight is to include provisions in its custody or parenting time orders that facilitate enforcement by courts in other jurisdictions. Such provisions should comply with the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), MCL 722.1101 et seq., and the Parental Kidnapping Prevention Act ("PKPA"), 28 USC 1738A. In general, provisions that facilitate enforcement support the issuing court's authority to act in the case and include:*

*Goelman, et al, *supra*, §208. The UCCJEA and the PKPA are discussed in Sections 13.2-13.16.

*For sample provisions, see Goelman, et al, *supra*, §208.

- Clear statements of the statutory basis for the court's exercise of jurisdiction over the proceeding. These statements should refer to specific provisions of the UCCJEA and the PKPA.* See MCL 722.1201-722.1204 and 28 USC 1738A(c) for jurisdictional bases under these statutes. See also Sections 13.5 and 13.12.
- Proper identification of the parties to the order.
- Description of the circumstances surrounding service on and notice to the parties. See MCL 722.1106-722.1108 and 28 USC 1738A(e) regarding service and notice requirements under the UCCJEA and the PKPA.
- Identification of the parties present at the hearing and whether the parties were represented by counsel.

12.11 Resources for Locating Missing Children

The Federal Parent Locator Service ("FPLS") may be used to obtain and transmit information for the purposes of: 1) enforcing any federal or state law regarding the unlawful taking or restraint of a child; or 2) making or enforcing a child custody or visitation determination. 42 USC 653(a)(2)–(3).* For these purposes, 42 USC 663(c) specifies that FPLS information is accessible to "authorized persons," who are defined in 42 USC 663(d)(2) as:

*The FPLS is also used for purposes of establishing parentage and child support enforcement. See Section 11.4.

- Agents or attorneys of any state having the duty or authority to enforce a child custody or visitation determination.
- Any court with jurisdiction to make or enforce a child custody or visitation determination, or any agent of such court.
- Any agent or attorney of the United States or a state who has the duty or authority to investigate, enforce, or bring a prosecution with respect to the unlawful taking or restraint of a child.

Information as to the most recent address and place of employment of a parent or child may be disclosed to authorized persons under 42 USC 663(c). For purposes of parental kidnapping or custody enforcement, this information is not accessible to parents of a child.*

*However, parents have access to FPLS information for purposes of support enforcement. See Section 11.4.

Because release of information from the FPLS is potentially dangerous for individuals who are in hiding from a domestic abuse or child abuse perpetrator, states are required to take measures to safeguard the confidentiality of identifying information in cases where: 1) a protective order with respect to a parent or child has been entered; or 2) the state has reason to

believe that the release of the information may result in physical or emotional harm to the parent or the child. The same safeguards apply regardless of whether the information in the FPLS is sought for purposes of parental kidnapping or custody enforcement or for purposes child support enforcement. 42 USC 663(c). For more information about these safeguards, see Section 11.4.

Michigan law enforcement officers are required to report missing children to the Law Enforcement Information Network, the National Crime Information Center, and the missing children information clearinghouse in the Department of State Police. MCL 28.258–28.259.